IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

ALFRED S. DAVIS, as Treasurer of RETAIL SHOE SALESMEN'S UNION, LOCAL 1115-F, R.C.I.P.A., affiliated with the American Federation of Labor, and "JOHN DOE" and "RICHARD ROE", members of RETAIL SHOE SALESMEN'S UNION, LOCAL 1115-F, R.C.I.P.A., pickets in front of plaintiff's store, true names of said persons being unknown,

Petitioners,

against

DINNY & ROBBINS, INC.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Opinions of Courts Below:

The Supreme Court of the State of New York made findings of fact and conclusions of law (R. 18-27), and did not render an opinion. The majority of the Appellate Division of the Supreme Court of the State of New York, First Department made findings of fact and conclusions of law (R. 80-83). The majority wrote an opinion (264 App. Div. 375; R. 85). The Court of Appeals of the State of New York wrote an opinion (290 N. Y. ; R. 89-95).

II. Jurisdiction:

The statutory provision believed to sustain the jurisdiction of this Court to review the judgment of the Court of Appeals of the State of New York is Section 237-b of the Judicial Code of the United States (Title 28, U. S. C.; Section 344-b).

Date of Entry of Judgment to Be Reviewed:

The judgment of the Court of Appeals of the State of New York here sought to be reviewed was entered on March 29, 1943. The petition is timely within the requirements of Section 243 of the Judicial Code of the United States (Title 28, U. S. C.; Section 350).

III. Statement of the Case:

A summary of the facts has already been made in the preceding petition for a writ of certiorari, pages 2-10, which, in the interests of brevity, is hereby adopted and made a part of this brief.

IV. Specification of Errors to Be Urged:

The Court of Appeals of the State of New York erred in holding that an absolute injunction against peaceful and orderly picketing could properly issue because no employment relationship existed between the members of the petitioner union and the respondent unless pickets carried signs which were censored and set forth the specific language prescribed by the Court. In addition, the injunction prohibits all exercise of freedom of speech by word of mouth, sign or otherwise and permits a very

limited right of picketing by placard only in front of one specifically named store, thus preventing the exercise of even a censored right of free speech by word of mouth or otherwise, in any other place or part of the community. Such holding necessarily violated the constitutional guarantee of freedom of speech and assembly for there was no local question involved which furnished a basis for deciding the case without reference to the federal question. If in any respect the activities in question exceeded the bounds of the area of freedom of speech, and assembly guaranteed by the Constitution, the State Court should have separated the illicit conduct from the licit, and enjoined the former while protecting the latter. There was no justification, however, for the issuance of an indiscriminate blanket injunction. This is the fundamental error here urged.

V. Summary of Argument:

(A) The Injunction Issued by the State Court Violated the Constitutional Guarantee of Freedom of Speech and Assembly.

1. The activities in question consisted solely of peaceful and orderly dissemination of opinion of the petitioner union.

2. Restraint of such activity by judicial decree as well as by statute is forbidden by the decisions of this Court.

(B) There Was No Local Question Involved Which Furnished the Basis for Deciding This Case Without Reference to the Federal Question.

VI. Argument:

(A) The Injunction Issued by the State Court Violated the Constitutional Guarantee of Freedom of Speech and Assembly.

1. The activities in question consisted solely of peaceful and orderly dissemination of opinion of the petitioner union.

There is no dispute whatever with respect to the peaceful and orderly character of the picketing conducted by one person, a member of the petitioner union. As has been noted in the statement of facts set forth in the petition for certiorari hereto annexed, the Trial Court specifically found:

> "The man walking up and down and bearing the aforementioned sign was not creating any disturbance." (55)
> "The man aforementioned used no violence in the course of his picketing." (56)
> "The man aforementioned was not disorderly in the course of his picketing which was peaceful at all times." (56)
> "The man aforementioned, while picketing, made no verbal statements concerning the picketing." (56)
> "The defendants have not called any strike against the plaintiff and have not stated that any of the plaintiff's employees were on strike." (57)

The Union, on December 2, 1941, sent to the respondent a letter, enclosing a copy of the contract requesting that the respondent communicate with the Union. The respondent failed to communicate with the Union and three weeks thereafter the Union commenced to picket peacefully, with a sign which stated that the respondent was

unfair to this said Union (58-60). The Trial Court further found

> "The defendant acted as it did for the purpose of benefiting its members and itself." (60)

Thus, it is clearly established that the picketing was conducted by one person in front of one store out of three, and that the picketing was at all times peaceful and orderly. Furthermore, no verbal statements of any kind were made or uttered and the only statement addressed to the public was the language set forth on the placard which expressed an opinion by the Union that the respondent was unfair to it.

The Trial Court found that such picketing

> "was misleading as it created the impression that the plaintiffs were unfair to labor." (55)

The Trial Court further found that such picketing

> "was misleading to the general public and the customers of the plaintiff in that they were led to believe that the employees of plaintiff were on strike, and that the plaintiff was unfair to organized labor." (74)

These findings were made despite the fact that no member of the public or customer of respondent testified to that effect. This was merely an opinion of the Trial Court and the inference it drew from the exercise of the right of peaceful picketing with a sign bannering an employer as "unfair". The Appellate Division adopted the findings of the Trial Court with the exception of the findings that the picketing was misleading to the general public and that the customers of the plaintiff were led to believe that the employees of the respondent were on strike. Nor were the findings of the Trial Court altered

by the Court of Appeals except to reinstate the findings regarding the misleading impression which members of the public gained from such activities. It is also important to note that the respondent was unable to prove that any damage resulted to its business because of such peaceful persuasion. There is no conflict of evidence regarding the activities of the petitioner. The only issue appears to be that (1) carrying a placard with the word "unfair" is a wrong and unlawful act; and that (2) no picketing of any kind is permissible, where an employer employs members of another Union, unless the placard contains censored language as prescribed by the State Court.

In view of these facts, the issues presented to the State Courts were necessarily limited. There were two basic questions:

a. Whether the conduct and activities prescribed herein were an exercise of the constitutional right of free speech.

b. Whether a statutory labor dispute existed.

If a "labor dispute" were found to exist, it would require the dismissal of the complaint for failure to comply with the provisions of the statute. It is apparent that the decision of the second question relating to the existence or non-existence of a labor dispute could not finally determine the case because the State Court still had to pass upon the fundamental constitutional question.

2. The Constitutional Guarantee Here Invoked:

The injunction issued by the New York State Supreme Court was in direct contravention to the Constitution of the United States in that thereby the State of New York

was enforcing a judgment and law which abridged the privileges and immunities of the petitioners as citizens of the United States, and in that thereby the petitioners were deprived of liberty without due process of law.

3. The Decision of the New York State Court of Appeals Is Inconsistent with the Decisions of This Court:

As shown by the statement of facts set forth in the petition for certiorari, which we have incorporated in this brief by reference, the petitioner union was engaged in peaceful and orderly picketing by means of one picketeer in front of one store owned by the respondent. No false statements of fact were made or uttered. No violence or mass picketing was indulged in. The only activity was in having one picket walk back and forth in front of a store carrying a placard which stated that the respondent was unfair to the petitioner. No verbal statements of any kind were uttered. Because it appears that the respondent was under contractual relationship with another union, it is contended that the petitioners' right to exercise free speech may be limited and prohibited absolutely because no direct employer and employee relationship exists between the petitioner and the employees of the respondent. This Court, in *Journeymen Tailors Union Local 195* v. *Miller's, Inc.*, 61 S. Ct. 732, reversed the judgment of the highest court of the State of New Jersey upon an application for a writ of certiorari where very similar facts existed. There, a union picketed an employer who employed members of another union.

In *United States* v. *Hutcheson*, 61 S. Ct. 463; Chief Justice Stone, in a concurring opinion stated:

> "* * * the publication, unaccompanied by violence, of a notice that the employer is unfair to organized

> labor and requesting the public not to patronize him, is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress. See Thornhill *v.* Alabama, 310 U. S. 88."

In *A. F. of L.* v. *Swing,* 312 U. S. 321, this Court said:

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. *The interdependence of economic interest of all engaged in the same industry has become a common-place."*

The petitioner union, the C.I.O. union under contractual relationship with the employer and the respondent herein are all engaged in the same industry.

Mr. Justice Murphy, in *Thornhill* v. *Alabama,* recognized the danger of censorship, when he said:

> "The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See Near *v.* Minnesota, 283 U. S. 697, 713."

The Court of Appeals of New York has set itself up as a judicial censor of proper objectives of a labor union and is substituting its particular notion of right or wrong in determining whether the right of free speech in its absolute sense may be exercised by the petitioner union. In an analogous case this Court recently, in *Largent* v. *State of Texas* (559—October Term—1942), rejected an ordinance which permitted a mayor to issue a permit for the distribution of publications if he "deems it proper or advisable". Justice Reed said:

> "Dissemination of ideas depends upon the approval of the distributor by the official. This is administrative censorship in an extreme form. It abridges the freedom of religion, of the press, and of speech guaranteed by the Fourteenth Amendment."

In the case at bar the state judiciary has assumed the power to deprive individuals of their constitutional right because it in effect deems their activities improper or unwise. It would be repetitious to quote from the numerous cases this Court has decided within the past two or three years, upholding the right of labor unions to disseminate information or opinions which they deem relevant to their own interests.

Thornhill v. *Alabama,* 310 U. S. 88, 105;
Carlson v. *California,* 310 U. S. 106
Milkwagon Drivers Union v. *Meadowmoor,* 312 U. S. 287;
Bakery and Pastry Drivers Union v. *Wohl,* 315 U. S. 769;
Cantwell v. *Connecticut,* 310 U. S. 296;
Schneider v. *State,* 308 U. S. 147.

The dissenting opinion of Chief Judge Lehman accurately appraises the grave danger of the judgment of the Court of Appeals. He said:

> "I concur in the opinion of Desmond, J. The Constitution of the State of New York, and the Constitution of the United States guarantee freedom of speech and those guarantees are violated by censorship though exercised by a court with conscientious intent that no representations which in the opinion of the Court distort the truth, and no arguments which, in the opinion of the court, are specious, should induce the public to appraise the merits of a dispute in manner which ignores the economic axioms of the orthodox and the social philosophy of the respectable."

The conclusion is inevitable that in restraining the conduct aforesaid the Courts of New York were violating the rights of the petitioners guaranteed by the Constitution of the United States. We believe it to be of the utmost importance that this Court clearly rule that the holding of the *Journeymen Tailors* case and *United States* v. *Hutcheson,* as well as the *Swing* case is applicable to the situation in this case. As has been indicated in the accompanying petition, the question is of national importance because, as will be noticed, the vital interests of industry and of labor cut across state lines and the establishment of judicial censorship of opinions in labor matters in one state definitely affects labor relations in other states. The decisions of labor matters in New York having been followed for many years by most states, it is inevitable that divergent views and adoption of this principle may follow. It is important that divergent views on the part of the various state courts with respect to this federal question be not permitted to arise and exist.

4. The Judgment of the State Court Inaugurates Judicial Censorship of Speech in Labor Controversies:

The analysis of the opinion by the majority of the New York Court of Appeals in this case definitely shows that the determination was based upon its particular conception of right or wrong, and its belief as to how industrial affairs should be conducted in the exercise of free speech. Its decision means that it is no longer permissible for labor unions to engage in activities which have heretofore been recognized as lawful and proper, where the majority of the Court of Appeals does not think that opinions expressed are relevant to the issues. By holding that the petitioner's peaceful activities were "unlawful", it is impossible to extract any uniformly applicable set of economic or legal principles. That Court has enunciated a dangerous doctrine of attaching the label "unlawful", or "retaliatory", where it deems the exercise of free speech or the issues involved unwise or improper. It is clear that the Court of Appeals assumed the power to render an *ad hoc* determination upon the merits of the particular social and economic problem presented and accordingly to restrict freedom of speech.

This decision warns that henceforth labor organizations are not free to pursue peaceful activities until judicial approved has been obtained. By virtue of this decision, the lawfulness or unlawfulness of the exercise of free speech is to be determined *de novo* in each case which comes before the Court. Persons interested in labor disputes will have the privilege of communicating their opinions to others only if the State Court approves the objects sought to be attained and whether or not that object meets judicial approval will be known only when the Court has ruled. That the adoption of such a doc-

trine constitutes absolute and unconfined judicial censorship of speech cannot intelligently be doubted.

Under the policy aforesaid, the Court's supervision of objectives is not necessarily limited to the field of labor controversies. The same logic or illogic would permit the determination by the Court of the legality of all objectives sought to be attained by the free communication of ideas. Thus, it may reasonably be expected to follow, if the decision in the case at bar is held constitutionally sound, that state courts will assume the power to declare generally in what causes banners may be carried, pamphlets distributed and oral statements voiced, and in what causes silence must be maintained or in what causes statements first censored by the judiciary may be uttered. This forecast should not be dismissed as absurd because this is precisely what the Court of Appeals has already done in the field of labor controversies, and before this doctrine has become rooted, there is urgent need to inquire by what authority the field of labor controversy, more or less than any other field of human activity, merits subjection to judicial censorship. The state judiciary has assumed to exercise a power in the case at bar which thus far neither legislative nor even administrative agencies of the State have ever ventured to exercise. The continued exercise of such power is fraught with a danger most grave and most immediate.

B. There Was No Local Question Involved Which Furnishes a Basis for Deciding This Case Without Reference to the Federal Question.

As has been noted, there were but two issues presented to the New York State Courts: (1) whether the peaceful activities of the petitioner union in disseminating facts and opinions concerning an industrial dispute was

subject to injunctive restrains; and (2) whether a statutory labor dispute was involved.

We have already pointed out that the decision of the second question, unless in favor of the petitioner union, could not be determinative of the case, so that the state courts necessarily had to pass upon the first question which was an essentially substantial and important federal question, in order to arrive at a decision in favor of the respondent. Not only does the opinion bear this out but the amended remittitur also states that a question under the Constitution of the United States was presented and necessarily passed upon, and that the petitioner union contended that the injunction of the Trial Court violated the constitutional rights of free speech, belonging to the respondent. The said remittitur also states that the Court of Appeals held that the judgment did not violate the petitioners' constitutional right of free speech.

CONCLUSION

The writ of certiorari requested by the petitioners should be granted, the judgment of the Court of Appeals of the State of New York should be reviewed by this Court, and the said judgment should be reversed.

Respectfully submitted,

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On the Brief,

SIMON J. LIEBOWITZ
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(23)

Office - Supreme Court, U. S.
FILED
JUN 11 1943
CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM 1942

No. 1042

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Petitioners,

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DINNY & ROBBINS, INC.,

Respondent.

RESPONDENT'S BRIEF

SAMUEL J. ROBBINS,
Attorney for Respondent.

On the Brief,
SAMUEL J. ROBBINS
and
SIDNEY O. RAPHAEL.

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Supreme Court of the United States

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Petitioners,

against

DINNY & ROBBINS, INC.,

Respondent.

RESPONDENT'S BRIEF

. Statement of the Case:

The respondent operates three retail shoe stores in permanent locations in the City of New York. As a result of a collective bargaining agreement entered into October 1st, 1941, with the Retail Shoe Salesmen's Union of New York, Local 1268, chartered by the United Retail, Wholesale and Department Store Employees of America, affiliated with the Congress of Industrial Organization (C. I. O.), the respondent was legally obligated to maintain a closed shop and all of its employees were required to be members of the latter union. The contract covered in great detail the wages and other working conditions of the respondent's employees. The contract followed at least two earlier contracts with this C. I. O. union, each for a similar period. The contract entered into on October 1st 1941, was by its terms, in full force and effect at the time the picketing was commenced by the petitioner

herein; not terminable until October 1st, 1942, which was the expiration date mentioned in the agreement.

The respondent's complaint before the Supreme Court of the State of New York, alleges the aforementioned facts and further asserts that there is no real labor dispute between the parties herein. That there is no controversy concerning wages, hours or other working conditions, nor had the defendant, prior to the commencement of the picketing ever attempted to organize the respondent's employees. There was no pretense or claim on the part of the petitioner that the picketing of the plaintiff's stores was a bona fide attempt at collective bargaining, with the object of increasing wages or bettering conditions of the plaintiff's employees. On the contrary, it was an undisputed fact and a matter of factual finding by the Court that no strike had been called against the respondent, and further that the respondent in good faith, had entered into and was operating under the binding collective bargaining agreement with the C. I. O. union, referred to hereinabove.

The attempt at laying a basis in aid of justifying the picketing by the petitioner by resorting to the ruse of sending a letter to the respondent containing the simple demand on the part of the petitioner that the plaintiff abrogate its contract with the C. I. O. union and enter into a contract it proposed was a mere subterfuge. This latter statement is amply borne out by the findings made in the Appellate Division, known as "Findings 9 and 11" which we quote as follows:

> "*Finding No. 9:* The defendants have not called any strike against the plaintiff and have not stated, except by implication that any of the plaintiff's employees were on strike."
>
> "*Finding No. 11:* That the C. I. O. unions were picketing stores employing members of the defendant union and subsequently the picketing herein commenced."

It is clearly evident that the picketing was purely and simply retaliatory; an extramural dispute between two rival unions springing from a motive other than that on part of the petitioner to effect a betterment of labor conditions or working standards of employees engaged in a retail shoe industry.

The picketing was carried on by persons bearing placards containing a legend which read as follows:

"Dinny & Robbins Shoes

are

Unfair to

Retail Shoe Salesmen's Union, Local 1115-F,
R.C.I.P.A., American Federation of Labor."

It is apparent from even a cursory examination of the style employed in the composition of the within legend that emphasis was layed upon the prefatory words "Dinny & Robbins Shoes are unfair to * * *." What the pickets were accentuating by the placards were the facts in bold letters standing out at the top of the placard was that the respondent's shoes were unfair to the petitioner. The trouble with the style employed in this legend is that too much emphasis was placed upon the prefatory words indicating the unfairness of the respondent and too little stress was placed upon the balance of the legend which would indicate that the unfairness was only to the petitioner herein. Furthermore the Supreme Court of the State of New York, took the position that this latter fact coupled with the additional fact that there was a tendency on the part of this legend to be misleading, inasmuch as this term "unfair" might be construed as connoting a general unfairness, and a lack of sympathy on the part of the respondent, would permit picketing to continue only if the petitioner would

include in the legend a statement which would truthfully set forth the respective positions of the petitioner and the respondent and give eminent and fair publicity to the true issue.

II. Summary of Argument:

(a) The injunction issued by the Supreme Court and affirmed by the Court of Appeals, conformed with all the principles of equity, jurisprudence and was interpreted under a local law of the State of New York.

(b) There is a local question involved under Sections 703, *et seq.*, of the Labor Law of the State of New York, under which the judgment of the State Court can be amply sustained.

(c) The injunction issued in favor of the respondent did not violate the constitutional guaranty of "Freedom of Speech and Assembly".

III. Argument:

(A) The injunction issued by the Supreme Court and affirmed by the Court of Appeals, conformed with all the principles of equity, jurisprudence and was interpreted under a local law of the State of New York.

One has but to look to the proposed findings submitted by the petitioner herein on the settlement of the decree in the Trial Court to readily ascertain the fact that even the petitioner conceded the fact that this respondent had contractual relationship with the C. I. O. union, in this very same retail shoe field for a period of three and a half years prior to the entry upon the scene by the petitioner. Furthermore, the petitioner in another proposed finding, No. 10, submitted by it, agreed that it had not called any strike against the respondent's employees,

nor were any of the respondent's employees on strike at the time. It is further evident from the findings made by the Appellate Division, that this picketing commenced by the petitioner was in furtherance of a pseudo strike to retaliate and counteract picketing which had been leveled by the C. I. O. union against this petitioner prior thereto. By resorting to this latter form of pressure, this petitioner had hoped to alleviate a problem which had been pressing it and the employers with whom it supposedly had collective bargaining agreements. It is noteworthy that this respondent is in no way connected with this extramural controversy. The evidence purely and simply demonstrates that this respondent is wedged between two irreconcilable organizations in a controversy which does not concern this respondent in the slightest degree.

The Court further found as a fact and this was reaffirmed by the Court of Appeals that the letter written by the petitioner demanding the entry into a collective bargaining contract with it under the peril of risking a strike was nothing more than a mere subterfuge. It was attempting to create a pretext for what ensued thereafter. Two legal issues were demonstrated at the trial of the respondent's injunction case. They were namely: Whether the issue presented was a labor dispute within the meaning of Section 876A of the Civil Practice Act, and whether or not the Court possessed the power to prevent the interference with a valid and legally subsisting collective bargaining agreement under the terms of which this respondent was already bound.

Section 876A of the Civil Practice Act is patterned along the lines of the Norris-LaGuardia Act (29 U. S. C., pp. 101-115). In substance it immunizes labor disputes against restraint by picketing. Injunctions can no longer be granted which would insulate the employer against picketing by a bona fide labor union, acting in behalf of

the employees in betterment of their working conditions and standards.

The Court concluded after a trial of the issues that there was no genuine labor dispute. It was self-evident after an examination of all the salient facts that the defendant's efforts were a mere subterfuge, in aid of its retaliatory counterattack against the C. I. O. with which this employer had a bona fide collective bargaining agreement. As hereinabove stated this petitioner by its own proposed findings submitted to the trial court, admitted the existence of this collective bargaining agreement and that there was no strike declared against the respondent, nor were the respondent's employees on strike. In this way was the preliminary objective handled, and the Findings of Fact and Conclusions of Law made that there was no labor dispute under Section 876A of the Civil Practice Act and that therefore the Court possessed common law, chancery, jurisdiction to proceed with the granting of an injunction after it was satisfied from a preponderance of the evidence as submitted by this respondent that it was entitled to equitable relief.

To determine the latter issue, the Court was guided and influenced by Article 20 of the Labor Law of the State of New York, specifically Sections 700 through 709 of the Labor Law.

The respondent by virtue of its collective bargaining agreement then in force with the C. I. O. union and not expiring until October 1st, 1942, could not run the gamut of entering into a collective bargaining agreement with this petitioner by disaffirming such existing contract between themselves and the C. I. O. union. In doing so it would be guilty of an unfair labor practice and subject to the punitive provisions of the State Labor Relations Act. Inasmuch as the contract which was executed between this respondent and the C. I. O. union encompassed

a closed shop, and represented the will of 100% of the respondent's employees, and the C. I. O. union was the duly accredited bargaining agent for these employees, this respondent was precluded from and prohibited by the New York State Labor Relations Act from recognizing any other collective bargaining agent during the term of the existing agreement, unless ordered to do so sooner by the affirmative action of the New York State Labor Relations Act.

See: *Matter of Triboro Coach Corp.* v. *N. Y. State Labor Relations Board,* 286 N. Y., page 314;
Florsheim Shoe Co. v. *Retail Shoe Salesmen Union,* 288 N. Y., page 188.

This is the only conclusion which is possible to harmonize with the projected public policy of the State as declared in its Labor Relations Act, so as to put to an end, once and for all, confusing, jurisdictional and retaliatory strikes and other forms of industrial unrest, and instead encourage industrial peace among employers and employees.

See: *United Baking Co.* v. *Bakery & Confectioners Union,* 257 App. Div. 501.

As a matter of fact this Court denied certiorari in a case in which the circumstances were not as compelling as those in the case at bar and in effect, upheld an injunction granted against picketing by a rival union to supersede a validly existing and genuine bona fide bargaining agreement, entered into theretofore by an employer.

See: *United Electric Coal Co.* v. *Rice,* 80 Fed. (2nd), page 1. Cert. den. 297 U. S. 714.

This latter decision was made even prior to the time the Wagner Act effectively set at rest disputes concern-

ing legal and proper certification of bargaining representatives for employees. The Court invoked its general chancery jurisdiction to issue and sustain in behalf of this Coal Company, an injunction banning picketing, arising out of a dispute between two unions.

In the trial of this action, the Court had before it the further evidence substantiating the practices of this petitioner with respect to other employers in the retail shoe industry in the City of New York, where resort had been had to this very same form of picketing in aid of its retaliatory campaign against the C. I. O.

See: *London Character Shoe Corp.* v. *Davis,* 31 N. Y. Supp. (2nd) 807;
Coward Shoe v. *Retail Shoe Salesmen's Union,* 177 Misc. 708;
Coward Shoes v. *Same,* N. Y. L. J., Nov. 23, 1942 (decision by Mr. Justice Cohalan);
Kitty Kelly Shoe v. *Same,* decision unreported.

With this panorama as a background and with the instant facts in the case at bar as a foreground, the Court proceeded to exercise its equitable powers and issue its decree forbidding the picketing resorted to herein. While this respondent contends that the Court could have generally barred all forms of picketing, it nevertheless permitted a continuance of picketing, provided that the same would not be false or misleading and that the legend would not be in the form as that contained in the placard, namely:

"Dinny & Robbins Shoes

are

Unfair to

Retail Shoe Salesmen's Union, Local 1115-F, R. C. I. P. A., American Federation of Labor"

but instead in the following form:

> "This is no strike. All employees of Dinny & Robbins, Inc. are regular members of local 1268, C. I. O., not members of Local 1115-F, R. C. I. P. A., A. F. of L."

It was further provided that the latter quotation be all in the same type and at least be all of the same dimensions

Summarizing, the Court granted equitable relief to restrain an interference with the collective bargaining agreement by the dissemination of statements which were untrue or misleading. In a nutshell, the petitioner was required to truthfully present its case to the public.

(B) There is a local question involved under Sections 703, *et seq.*, of the Labor Law of the State of New York, under which the judgment of the State Court can be amply sustained.

It is academic that this Court will not review a State Court decision, construing or interpreting a statute of its own State.

Neblett v. *Carpenter,* 305 U. S. 297.

It is apparent from the foregoing that in arriving at the result it did, the Court construed the meaning and effect of the New York State Labor Relations Act, *supra.* In doing so, it held that the petitioner's conduct herein did in fact incite or provoke an actual or threatened interference with a genuine collective bargaining agreement between this respondent and the C. I. O. union then in effect. If fostered and encouraged, it would result in the involvement of this respondent in the commission of an unfair labor practice, in direct violation of the State Labor Relations Act. To prevent an unlawful interference with this contractual relationship, the Court con-

strued the State Labor Relations Act, as prohibiting the impairment of an existing collective bargaining agreement and a disavowal of unions' rights under such an agreement to continue as a collective bargaining agent unless the State Labor Relations Board, having jurisdiction under the aforesaid act, directs otherwise after due and lawful hearing, in which all the parties concerned would be heard and due process afforded. The Court having found factual substantiation in the evidence for its conclusions that this petitioner was not rebelling against the labor standards prevailing in this respondent's stores, nor that this petitioner was representing the interests of the respondent's employees for an elevation of their labor conditions, the Trial Court rightfully exercised its general equitable power, fortified by the provisions of the New York State Labor Relations Act and granted the decree it did.

Under the circumstances the respondent urges that the decree having been properly founded upon local law, as well as local statute, certiorari should be denied.

(C) The injunction issued in favor of the respondent did not violate the constitutional guaranty of "Freedom of Speech and Assembly".

The New York State Legislature has provided in the State Labor Relations Act, *supra*, a due and orderly process for settling labor disputes such as this petitioner pretends to have with the C. I. O. union. The petitioner was well aware of the facts, particularly the respondent's responsibility under the terms of its collective bargaining agreement. It had never exhausted the remedies available in those channels afforded by the State Labor Relations Act. On the contrary the petitioner sought to handle this situation in its own way. It now contends that its right of free speech, has been abrogated.

In examining the petition in support of the within writ, one finds many mis-statements and exaggerations as to the contents of the record in the Trial Court, as well as in the Appellate Court.

For instance, on page 4 of the petitioner's record, the following statement appears:

> "A broad and absolute permanent injunction was granted, the contents of which are more fully discussed in a subsequent paragraph."

This is definitely a very incorrect statement, because had the Court granted a broad and absolute permanent injunction, this petitioner would not have been accorded the right to continue picketing, provided the placard bore a truthful legend.

Then at the end of page 5 and the beginning of page 6 of the same record, the petitioner again makes the following statements, apparently to influence this Court:

> "Thus, it is apparent that the trial court granted a permanent injunction which was broad and absolute and restrained the Union for all times from exercising peaceful 'persuasion', against the customers of respondent or any other persons having business relationship or intending or desiring to have business relationships with the respondent. The injunction prohibited all 'persuasion' of any kind, in any form, whether it be by placard, picketing, word of mouth, advertisements, hand bills, etc. except that only one of respondent's three stores could be picketed, and such picket must carry a sign which must read as follows:
>
> > "This is no strike. All employees of Dinny & Robbins, Inc. are regular members of Local 1268 C. I. O., not members of Local 1115-F, R. C. I. P. A., A. F. of L."

Nowhere in the injunction was there any prohibition against the distribution of hand bills, or the publishing

of advertisements which would truthfully set forth the grievance, if any, on the part of this petitioner, nor was there any odium in this petitioner trying to reach some of the employees of the respondent by truthful, honest and respectable means. The Court simply enjoined picketing in front of the respondent's premises by tokens which were untrue and misleading. The attempts by this petitioner to spell out from the terms of the decree prohibitions which are not found there, and then in turn claim that they were violative of the provisions of the Fourteenth Amendment, are specious.

Many cases are cited by the petitioner in support of its contention that its rights of free speech and assembly have been circumscribed. The respondent does not even pretend to take issue with any of these decisions, for they correctly state the law prevailing with respect to the interpretation of the Fourteenth Amendment. No one can gainsay the fact that honest labor disputes or efforts by unions to legitimately attain either better working conditions or greater membership can be delimited by an injunction decree which would prohibit the rights of either peaceful picketing or free voice, opinions or sentiments, in aid of a legitimate pursuit on the part of such labor organization.

See: *A. F. of L.* v. *Swing,* 312 U. S. 321;
Bakery & Pastry Drivers Union v. *Wohl,* 315 U. S. 769.

In the last cited case, the Court painstakingly pointed out that in that case the Trial Court had found that the placards used in the picketing were truthful and accurate in all respects and was done in a peaceful and orderly manner. Apparently great emphasis was laid on this particular part of the findings of the lower Court. In the instant case however, the Court did find as an affirmative fact that this petitioner did use untruthful legends

in its placards while picketing and that the statement on the sign that the respondent was unfair to the petitioner was false inasmuch as there was no obligation on the part of the respondent to enter into contractual relationship with this petitioner because of the statutory barriers imposed by the implicit language of the State Labor Relations Act. The use of the word "unfair" in the legend and the manner in which it was accentuated on the placard lends emphasis to the Court's findings that this petitioner attempted to practice a deceptive type of picketing at the respondent's premises. The manner in which the legend was styled gave emphasis to the correlation between the respondent's name and the word "unfair". In the mind of the average passerby and the public generally, this would only connote one meaning, namely that this respondent was unfair in its dealing with labor. To adjust and correct such possible misconception, the Trial Court ordered uniform lettering on the legend and a terse statement of the true facts forming the basis of the petitioner's alleged grievance.

No one can question the rights of the State Court to interpret and construe the meaning of the State Labor Relations Act, so as to prevent the commission of unfair labor practices.

> See: *Hotel & Restaurant Employees Union* v. *Wisconsin Employment Relations Board,* 315 U. S. 437, 440, 441.

In the case of *Senn* v. *Tile Layers Union,* 301 U. S. 468, Justice Brandeis in justifying peaceful picketing observed that,

> "The publicity did not involve misrepresentation of fact, nor was any claim made below that relevant facts were suppressed."
>
> See also: *Retail Clerks Union Local 1403 et al.* v. *Wisconsin Employment Relations Board,* 242 Wisc., page 21.

One should not assume that Courts of equity have divested themselves of all power to enjoin some forms of excess of so called free speech. Improper and pretended uses of the broad coverage of the Fourteenth Amendment should not be so insulated as to restrain justifiable curbs, when it has been found that there have been actual or threatened abuses of these constitutional privileges. Especially is that so where attempts were made either to resort to violence, practices of fraud, or unjustly victimizing one by a spuriously founded labor dispute, such as in the instant case. The Courts of the State of New York, have long since recognized this principle and have recognized the danger of picketing via misleading and fraudulent legends. Appropriate relief in the form of both civil and penal remedies have been afforded.

People v. *Jenkins*, 255 N. Y. 637;
People v. *Bellows*, 281 N. Y. 67;
Canepa v. *John Doe*, 277 N. Y. 52.

In contradistinction to the situation that prevailed in the case of *Bakery and Pastry Drivers Union* v. *Wohl*, *supra*, the petitioner here affirmatively resorted to fraud and deception which was found as a fact and a conclusion of law by the Trial Court. We respectfully submit that this finding and conclusion founded as it is upon substantial evidence should not be disturbed. The Court did not deprive this petitioner of its rights of free speech, but merely curtailed the excesses that had been indulged in by it in unfairly disseminating its pretended dispute in the circumstances. We do not suppose that the petitioner contends that its deceptive processes are enshrined in the sanctity of constitutional guarantees. Can it be justifiably heard to complain that it must now disseminate propaganda or literature that is in substance untruthful? Certainly it cannot be contended that

this is a legitimate grievance which this or any other Court should be called upon to remedy. In applying the rule of *"Sie utere tuo ut alienum non laedas"* the State Court safeguarded the property rights of the plaintiff against unlawful and unwarranted incursions by the defendant. Thus were the defendant's rights and privileges properly recognized; curbed only by considerations of plaintiff's rights and curtailment of excesses indulged in by the defendant. Both legally, factually and morally the injunction decree granted by the Trial Court was fair and proper.

CONCLUSION

The writ of certiorari requested by the petitioner should be denied.

Respectfully submitted,

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On the Brief,
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